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PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1953

No. 184

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,

Petitioner,

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, AND 22,081 STOCKHOLDERS OF THE UNITED CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JULY 16, 1953

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. I

The General Protective Committee for the Holders of Option Warrants of The United Corporation,
Petitioner,

v.

The Securities and Exchange Commission, The United Corporation, Edward R. Downing, Randolph Phillips, and 22,081 Stockholders of The United Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on March 31, 1953.

OPINIONS BELOW.

The findings and opinion of the Securities and Exchange Commission (R. 5), Holding Company Act of 1935 Release No. 10614, are unreported. The opinion of the Court of Appeals (R. 391) is reported in 203 F. 2d 611.

JURISDICTION.

The judgment of the Court of Appeals (R. 417) was entered on March 31, 1953. A petition for rehearing (R. 419), timely filed on April 13, 1953, was denied on April 22, 1953 (R. 437). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and 15 U. S. C. § 79x.

QUESTIONS PRESENTED.[1]

1. Where an order of the Securities and Exchange Commission, approving a simplification plan under Section 11(e) of the Public Utility Holding Company Act of 1935

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[1] If this petition for certiorari is granted, the following additional questions will be presented if this Court should desire to hear argument thereon:

A. Did the Court below, in approving the forfeiture of warrants to purchase common stock, give proper effect to *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336 (1951), in this case where fairness to other security-holders does not require such forfeiture, and in the absence of a finding that there are no grounds for a reasonable expectation that, within the foreseeable future, the market price of such stock will exceed the proper exercise price of the warrants?

B. Is there substantial evidence in the record as a whole to support such required finding or the inability of the Securities and Exchange Commission to find that the market price of such stock will within the foreseeable future exceed such exercise price?

C. Is a 30% reduction in the exercise price of such warrants permissible under the Public Utility Holding Company Act of 1935, fair to the stockholders, and required so as to be fair to warrant holders where, as ordered by the Commission under that act, the assets of the issuer have been diminished by 30% by a capital dividend paid to the stockholders?

for the forfeiture of certain securities, is stated to be not operative until enforced by a district court under that section (which requires approval by such a court after notice and opportunity for hearing), may a holder of different securities, aggrieved only by other provisions of the commission order, obtain approval of such forfeiture by a court of appeals reviewing such order under Section 24(a) of that act, without approval by a district court or notice or opportunity for hearing?

2. Where a simplification plan under Section 11(e) of that act provides for the continued existence (as an investment company) of a corporation which had issued perpetual warrants for the purchase of its common stock (these warrants and the common stock being its only outstanding securities) and also provides for the forfeiture of the warrants, may such a plan be approved merely on the ground that the warrants "unduly or unnecessarily complicate" the corporate structure of the corporation, where there is neither a finding nor evidence that the warrants complicate the structure of a holding company system?

3. Did the Court below abuse its discretion by approving a corporate simplification plan (theretofore approved by the Securities and Exchange Commission) filed pursuant to a statute providing for agency and court approval only if a plan meets specified requirements, when, due to events subsequent to approval of the plan by the agency, the plan at the date of court approval no longer meets such requirements?

STATEMENT.

The United Corporation is an investment company and was until July 15, 1952 a holding company under the Public Utility Holding Company Act of 1935 (49 Stat.

803, 15 U. S. C. § 79a *et seq.*), hereinafter called "the Act". Its outstanding securities are 14,072,149.5 shares of common stock and perpetual warrants (R. 172) to purchase 3,732,059 additional such shares.

The United Corporation in 1950 filed with the Securities and Exchange Commission a plan under § 11(e) of the Act providing, *inter alia*, for its continued existence as an investment company and for the issuance of five-year warrants in exchange for its outstanding warrants (R. 27). At the hearing on this plan, the staff of the Securities and Exchange Commission opposed the issuance or continued existence of warrants of even limited duration. *For this reason alone* (R. 86-8, 95-6, 175-7),[2] the plan was amended to provide for the forfeiture of the warrants. No evidence was offered in support of the fairness of such forfeiture. The United Corporation has no objection to the continued existence of the warrants (R. 87), and every witness on the fairness of the plan to warrant holders agreed that to cancel the warrants without compensation is *unfair* to warrant holders (R. 60-1, 66-7, 72, 89-90, 93-4, 145-6). Petitioner introduced substantial evidence (R. 97-148, 170-1) that the warrants have a fair investment value of at least $1.60 each ($5,971,294.40) and that the market value of the stock is very likely to

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[2] Counsel for The United Corporation stated on the record:

"I will stipulate on behalf of the applicant in this case that the amendment with respect to the treatment of the option warants was proposed because the applicant's board of directors, its officers and its counsel, concluded as a result of the cross examination of Mr. Hickey by counsel for the Commission, that the plan with respect to the option warrants as originally filed would be opposed by the staff of the Commission, and that the applicant wished to eliminate that part of the opposition to the plan because it was not prepared to litigate on the question of the option warrants." * * *

(Cross examination of Mr. Hickey, President of The United Corporation.)

"Q. You heard Mr. Smith make the statement? A. Yes.

"Q. Do you adopt that statement as being the fact? A. Yes.

"Q. And if it wasn't for that idea by that opposition, your company is still of the mind to carry through and desire to carry through the plan as originally proposed in connection with the exchange of warrants as offered in the original plan? A. Yes" (R. 95-6).

exceed the proper exercise price of the warrants within the next 12 or 15 years.

The Commission disregarded petitioner's evidence, and on June 26, 1951 approved the amended plan, concluding that the warrants constitute a complexity removable under the Act, that the likelihood of an increase in the market value of the stock to the exercise price of the warrants is too conjectural, and that the holders of the warrants "are not entitled, under the standards of fairness and equity, to any participation in the reorganization of United" (R. 30). The Commission's order provided that it "shall not be operative to authorize the consummation of the provisions of the plan as amended relating to the cancellation of United's option warrants • • • until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said provisions" (R. 48).

Edward R. Downing and Randolph Phillips, stockholders of The United Corporation, claiming to be aggrieved by other portions of the Commission's order, thereupon filed in the Court below under Section 24(a) of the Act a petition to review the Commission's order. They asked the Court below to approve and enforce the provision of the plan cancelling the warrants.

The Commission opposed them, taking the position (R. 214-9) that the Court below was without jurisdiction to do so and that exclusive jurisdiction to review this portion of the Commission's order was vested in a district court upon application by the Commission to enforce the plan under Section 11(e) of the Act.

The present petitioner, representing the holders of approximately 32% of the warrants, sought (R. 209), and was finally granted (R. 234, 417), leave to intervene in order to protect the warrant holders' interests in case the Court should disagree with the Commission. Petitioner requested the usual 45 minutes for argument and

leave to file a reply brief (R. 244). The Court ruled: "said motion be, and it hereby is, denied except that the time allowed to said committee for argument is extended to twenty minutes, said argument to be limited to the question, 'What are the rights of the warrant holders if this Court takes entire jurisdiction?'"[3] (R. 337).

Section 11(e) of the Act requires that any plan filed thereunder shall be "necessary to effectuate the provisions" of Section 11(b). These provisions require that "the corporate structure * * * of (a) company in (a) holding company system (must) not unduly or unnecessarily complicate the structure * * * of such holding company system." The Commission justified the cancellation of the warrants on the ground that they constitute a "useless and unnecessary complexity" in the corporate structure of *The United Corporation* (R. 10, 30). There was no evidence or finding of any complexity in the structure of its holding company system.

When the Commission's order was issued on June 26, 1951, The United Corporation, by reason of its ownership of more than 10% of the stock of two public utility companies, was a holding company within the definition in Section 2(a)(7)(A) of the Act.

Thereafter, however, and before this case was decided by the Court below, The United Corporation, by reason of the issue by one of its two subsidiaries of additional common stock (on December 28, 1951) and the sale by The United Corporation pursuant to the plan of its holdings of stock of the other (on July 15, 1952), ceased to hold 10% of the voting securities of any public utility and, consequently, ceased to be a holding company or a

[3] As a condition to the granting of the Commission's consent to the sale of the stock of the last subsidiary, the Commission required The United Corporation to stipulate that it would never claim that the Commission has lost jurisdiction in this case on the ground that, by reason of such sale, it ceased to be a holding company (R. 447-8). Obviously such stipulation by The United Corporation does not bind the warrant holders or confer on the Commission jurisdiction which the Act did not grant to it.

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Respondents.

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part of any holding company system.[4] Section 11(b)(2) of the Act provides: "nothing in this paragraph shall authorize the Commission to require any change in the corporate structure * * * of any company which is not a holding company."

If these recent events had been considered, it would have been impossible for the Court below to have held, or for the Commission to continue to hold, that the warrants created or constituted a complexity in the structure of a holding company system, since there is in existence no United Corporation holding company system which they could complicate. The forfeiture of the warrants therefore would no longer meet the "necessity" requirement of the Act, even if, contrary to petitioner's contention, it had before.

Petitioner duly[4] moved (R. 365, 439) for leave to prove the foregoing facts pursuant to the express provision for such motions in Section 24(a) of the Act. The motions were denied without opinion (R. 388, 396, 417-8).

On March 31, 1953 the Court below, without considering the new developments, affirmed (R. 417) the order of the Commission, holding that, contrary to the contentions of the Commission, it had jurisdiction to approve (though not to enforce) the forfeiture of the warrants, and that the Commission's findings with respect to the warrants were supported by substantial evidence (R. 391).

Petitioner's petition for rehearing (R. 419) was denied without opinion (R. 437).

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[4] These motions were filed by the Clerk of the Court below on January 30, 1952 and June 10, 1953, the respective dates of the orders of the Court (R. 388, 438) granting petitioner's motions for leave to file the motions in question. The motions for leave to file the motions in question (required since petitioner had not yet been granted leave to intervene), accompanied by the motions in question, were each filed promptly after the occurrence of the respective events (R. 364, 438).

REASONS FOR GRANTING THE WRIT.

I. Where an order of the Securities and Exchange Commission, approving a simplification plan under Section 11(e) of the Public Utility Holding Company Act of 1935 for the forfeiture of certain securities, is stated to be not operative until enforced by a district court under that section (which requires approval by such a court after notice and opportunity for hearing) a holder of different securities, aggrieved only by other provisions of the commission order, may not obtain approval of such forfeitures by a court of appeals reviewing such order under Section 24(a) of that act, without approval by a district court or notice or opportunity for hearing.

The decision of the Court below on this point is in direct conflict with that of the Court of Appeals for the Third Circuit in *Lowsbury* v. *S.E.C.*, 151 F. 2d 217 (1946), *cert.* denied 326 U. S. 782 (1946). That case held a court of appeals to be without jurisdiction to review even the parts of a commission order by which a stockholder was aggrieved [redacted], where the order was conditioned upon the subsequent entry of a district court order of enforcement. The only distinction between that case and this is that the order in the *Lowsbury* case was also conditioned on stockholder approval of the plan. This condition did not make the Commission's order any more interlocutory, however, and does not affect the principle involved. The Court below stated: "We do not regard the *Lowsbury* opinion as persuasive here" (R. 402).

The decision below is also in conflict with the *ratio decidendi* of the Court of Appeals for the Second Circuit

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[redacted] Petitioner of course may raise this question of jurisdiction, although petitioner did not press it in its pleadings below and was not allowed to argue it orally (R. 387). The point was made by the Commission before the Court below. *Capron* v. *Van Noorden*, 2 Cranch 126 (1804); *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379 (1884); *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6 (1950).

on this question in *Ohio* v. *S.E.C.*, 145 F. 2d 206 (1944), reversed on other grounds, 325 U. S. 840 (1945). The Court of Appeals for the First Circuit followed the *Lowenbery* and *Ohio* cases without discussion in *Blatchley* v. *S.E.C.*, 157 F. 2d 903 (1946) and *Goldfus* v. *S.E.C.*, 157 F. 2d 899 (1946). The three cases last cited (but not the *Lowenbery* case) may be distinguished, as the Court below pointed out, since the enforcement proceedings in the district courts there preceded in time the petitions for review filed in the courts of appeals, but they were not decided by the courts of appeals on that ground.

This is a question of federal law which has not been but should be settled by this Court. Section 24(a) of the Act provides:

> "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in (a) * * * court of appeals * * * by filing in such court * * * a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * [S]uch court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part."

The petitioning stockholders in the Court below were not aggrieved by the forfeiture of the warrants. Even if the Court below was right in deciding that it had jurisdiction to review the portions of the plan and the Commission's order by which the stockholders were aggrieved, it is clear that the purpose of this section was to provide for a review of only those portions of such a plan or order. The "exclusive jurisdiction" of the Court below to "affirm, modify, or set aside such order" relates only to the provisions of the order which the stockholders were authorized by Section 24(a) to request be "modified or set aside."

Certainly that section does not give a stockholder, not aggrieved by a Commission order adversely affecting others, power to obtain court approval and affirmance of that order. Yet that is precisely the effect of the decision of the Court below. The Act, on the other hand, in Section 11(e) expressly reserves that power to the Commission. It provides:

> "the Commission, at the request of the company, may apply to a (district) court * * * to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may * * * take exclusive jurisdiction and possession of the company * * *."

Even the Commission's power to obtain approval of such orders is thus rigidly circumscribed. It may be exercised only if the company so requests. The district court, before it may enforce a plan, is specifically required to approve it and may do so only after notice and opportunity for hearing. Opportunity for hearing, i. e., the right to present new material evidence, was denied petitioner by the Court below (R. 388, 417) as discussed in Part III hereof. No notice of the petition below has been given to the holders of the warrants whose forfeiture was approved. The Court stated that, when and if the plan goes to a district court for enforcement under Section 11(e), "*the district court has no function except to enforce, since affirmance by the court of appeals* necessarily held the plan necessary to effectuate the provisions of Section 11(b) and fair and equitable to the persons affected thereby, and its ruling *is res judicata* as to those questions" (R. 407—emphasis supplied).

APPENDIX.

STATUTES INVOLVED.

Sections 2(a)(7)(A), 2(a)(9), 11(b)(2), 11(e), 18(f), and 24(a) of the Public Utility Holding Company Act of 1935 provide in pertinent part as follows:

"Sec. 2. (a) When used in this title, unless the context otherwise requires—— • • •

(7) 'Holding company' means——

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company;"

• • • • • • •

(9) 'Holding-company system' means any holding company, together with all its subsidiary companies • • •."

"Sec. 11. • • • (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938: • • •

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in

If the Court below is correct on this point, *all* warrant holders, not merely the 32% thereof represented by the petitioner Committee, are bound by that decision, although most of them were not, and presumably still are not, aware that this proceeding was instituted. Such a construction of the Act should be avoided, since it raises serious doubts as to its validity under the "due process" clause of the Fifth Amendment to the Constitution.

II. Where a simplification plan under Section 11(e) of the Act provides for the continued existence (as an investment company) of a corporation which had issued perpetual warrants for the purchase of its common stock (these warrants and the common stock being its only outstanding securities) and also provides for the forfeiture of the warrants, such a plan may not be approved merely on the ground that the warrants "unduly or unnecessarily complicate" the corporate structure of the corporation, where there is neither a finding nor evidence that the warrants complicate the structure of a holding company system.

Section 11(e) of the Act requires that any plan filed thereunder be "necessary to effectuate the provisions" of Section 11(b). These provisions require that "the corporate structure • • • of (a) company in (a) holding company system (must) not unduly or unnecessarily complicate the structure • • • *of such holding company system*" (emphasis supplied). The Commission justified the forfeiture of the warrants on the grounds that their "presence in *United's structure* • • • constitutes a *corporate complexity* which must be eliminated under the standards of Section 11(b)(2)," that their cancellation "will complete the required simplification of *United's corporate structure*", and that they "perpetuate in the *corporate* structure useless and unnecessary complexities, in contravention of the requirements of Section 11(b)(2)"

(emphasis supplied) (R. 10, 30). The Commission never mentioned any complexity in the structure of the *holding company system.*[6]

Irrespective of the weight to be given to expert knowledge, a federal agency, when treading the boundaries of federal power, is under an obligation to a reviewing court to demonstrate that it has thought its problems through and to indicate the evidence upon which its findings are based. The decision of the Court below did not give proper effect to the decision of this Court in *Yonkers* v. *U. S.*, 320 U. S. 685 (1944). In that case this Court remanded a case to the Interstate Commerce Commission for failure *of that Commission* to find that an abandonment which it had approved was not an abandonment of railways "which are not operated as a part or parts of a general steam railroad system of transportation". The *court* below had made such a finding. The statute excluded from the Commission's jurisdiction any such abandonment. (In the present case neither the Court below nor the Securities and Exchange Commission made the finding here in question.) This Court said:

> "The Commission *though adverting to a number of the facts which we have mentioned* did not address itself to the question whether this electric branch line was or was not 'operated as a part or parts of a general steam railroad system of transportation' within the meaning of Section 1(22). The Commis-

[6] Yet the Commission has recognized that complexity of a holding company system is the fundamental issue. In a similar case, in disposing of certain arguments against one of its orders to eliminate a particular class of securities, it said:

> "These arguments, in our opinion, are based on a misapprehension of *the primary issue*, which is not whether the corporate structure of Commonwealth itself is unduly or unnecessarily complicated by reason of the number of its outstanding classes of securities. *The issue is whether such corporate structure* unduly or unnecessarily *complicates the structure of its holding company system as a whole.* * * *" *The Commonwealth & Southern Corp.*, 11 S. E. C. 138, 152 (1942), aff'd *sub nom. Commonwealth & Southern Corp.* v. *S.E.C.*, 134 F. 2d 747 (C. A. 3 1943) (emphasis supplied).

sion did not undertake to review the evidence relevant to that issue. It made no findings respecting it." (320 U. S. at p. 687-8—emphasis supplied).

"[W]e deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission." (320 U. S. at p. 689.)

"Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority should appear affirmatively and not rest on inference alone." (320 U. S. at p. 692.)

See also *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U. S. 515 (1945); *North Carolina* v. *U. S.* 325 U. S. 507 (1945), rehearing denied 326 U. S. 803 (1945); Davis, *Administrative Law* (1951) §§ 162, 164.

The regulation of corporate structures is a matter for state law, except when interstate systems of the type regulated by the Holding Company Act are present. The Commission was given no mandate by that Act to rewrite the corporation laws of the several states. A definite and specific finding of the illegal effect of a corporate complexity on a holding company system is essential to the validity of any order forfeiting securities of a corporation incorporated and existing under state law within such system.

It is conceded that warrants under some circumstances may work to the disadvantage of holders of other securities of the same corporation, for example, in connection with the raising of new equity capital. Berle and Means, *The Modern Corporation and Private Property* (1934) 201. There may have been times when subsidiaries of The United Corporation required capital and the raising of equity capital by the parent might have been impeded

by the outstanding warrants. Assuming, though not conceding, that for this reason during the early days of the Holding Company Act, the Commission might have found some scintilla of a jurisdictional fact in the relationship between the warrants and the then vast United Corporation system, no such finding could have been made at the times of the decisions of either the Commission or the Court below. That system on June 26, 1951 consisted of The United Corporation and two well-financed subsidiaries[7] (R. 7, 32, 42-3) which were to be disposed of under the plan. The Commission could not have found from the record before it that the warrants made the structure of the system intricate or difficult to understand or prevented The United Corporation from performing its functions or burdened the system. These have been held to be the proper tests. *In re Community Power & Light Co.*, 33 F. Supp. 901, 914 (S. D. N. Y. 1940); *Commonwealth & Southern Corp.* v. *S.E.C.*, 134 F. 2d 747 (C. A. 3 1943). Nor could the existence of the warrants have violated the standard laid down in *Central & Southwest Utilities Company* v. *S.E.C.*, 136 F. 2d 273, 275 (C. A. D. C. 1943), particularly when the system was to cease to exist (as it already has) upon or prior to enforcement of the Commission's order.

The difficulty in understanding the Commission's decision on this question arises in part from its failure to discuss it. This failure may, in turn, have been caused by the fact that discussion would have shown that the Commission could not make the required finding. The *only evidence* in the record is to the effect that the warrants are *not* a complication (R. 74, 147).

In addition to the fundamental question of administrative law, this question also presents an issue of substantial importance in the field of reorganizations, well deserving the attention of this Court. If a plan can be

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[7] Only one of the subsidiaries in turn had small subsidiaries of its own (R. 18).

approved without this required finding, a plan can also be approved without a finding that it is "fair and equitable."

III. The Court below abused its discretion by approving a corporate simplification plan (theretofore approved by the Securities and Exchange Commission) filed pursuant to a statute providing for agency and court approval only if a plan meets specified requirements, when, due to events subsequent to approval of the plan by the agency, the plan at the date of court approval no longer meets such requirements.

This is a question of federal law of importance which has not been but should be settled by this Court. Corporate reorganization plans are constantly being reviewed by federal courts after their approval by administrative agencies. This occurs not only under Section 11 of the Holding Company Act, but under the Mahaffey Act (§ 20b of the Interstate Commerce Act, 62 Stat. 163, 49 U. S. C. Section 208) and Section 77 of the Bankruptcy Act (47 Stat. 1474, 49 Stat. 911, 1969, 53 Stat. 1406, 65 Stat. 606, 11 U. S. C. § 205). Such plans are even more often reviewed by courts of appeals after approval by district courts in proceedings under Chapter X of the Bankruptcy Act (52 Stat. 883, 11 U. S. C. § 501 *et seq*).

All of these acts lay down certain requirements which must be met before such plans can be approved or enforced, i. e., they must be "in the public interest", "feasible", or, as under the Holding Company Act, "fair and equitable" and "necessary to effectuate the provisions of Section 11(b)" of that Act.

Assuming, though not conceding, that the plan of The United Corporation was both "fair" and "necessary" at the date of its approval by the Commission, it is not "necessary" today and was not on March 31, 1953 when the Court below approved it. Yet that Court refused to grant timely motions to bring onto the record the new

facts which render the plan *un*necessary, and did so without considering such facts or their materiality, thereby denying petitioner the opportunity for hearing which the Congress expressly granted in Section 11(e) of the Act.

This decision of the Court below is in conflict with decisions of the Courts of Appeals for the Second and Eighth Circuits and of a number of district courts. Where events occurring after approval of a corporate reorganization plan below were alleged and, if true, would have made the plan unfair or not feasible, these courts have remanded the cases for consideration of evidence of the new events by the commission or court below. *Missouri Pacific R. Co.* v. *Stedman* (C. A. 8 1943)[8]; *Wright* v. *Group of Institutional Investors* (C. A. 8 1947)[9]; *In re Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. Del. 1945); *In the Matter of American & Foreign Power Co., Inc.* (D. Me. 1949)[10]; *In the Matter of New York, Susquehanna and Western R. Co.* (D. N. J. 1950)[11]; *In re Florida East Coast Ry. Co.*, 52 F. Supp. 420 (S. D. Fla. 1943). In one phase of the *Missouri Pacific* proceedings Mr. Justice Frankfurter took the position in connection with denials of certiorari (*Missouri Pacific R. Co.* v. *Group of Institutional Investors*, 343 U. S. 982 (1952)) that there was still a substantial possibility that, before the plan was finally affirmed and consummated, review might again be sought.[12]

In *In re Equitable Office Building Corp.*, 72 Sup. Ct. 1086 (1946), Mr. Justice Reed stayed proceedings on a Chapter X reorganization plan to give the court below an

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[8] This unreported decision appears on p. 5a of the appendix hereto.

[9] This unreported decision appears on p. 6a of the appendix hereto.

[10] This unreported decision appears on p. 8a of the appendix hereto.

[11] This unreported decision appears on p. 9a of the appendix hereto.

[12] On November 25, 1952, the district court again remanded the thrice modified plan to the commission below pursuant to Section 208 of the Bankruptcy Act (62 Stat. 167, 991, 11 U. S. C. § 208), enacted in 1948, providing for remands where recent developments make reexamination of such plans necessary or expedient to assure that the plans are *then* fair and in the public interest.

opportunity to review the effect on the plan of changed circumstances and its power to act in the light thereof. The plan was thereafter amended due to such circumstances and consummated. *Knight* v. *Wertheim & Co.*, 158 F. 2d 838 (C. A. 2 1946), *cert.* denied *sub nom. Maguire* v. *Equitable Office Building Corp.*, 331 U. S. 818 (1947); *In re Equitable Office Building Corp.*, 83 F. Supp. 531, 544 (S. D. N. Y. 1949), aff'd in part *sub nom. Aranow, Brodsky, Einhorn & Dann* v. *Equitable Office Building Corp.*, 174 F. 2d 827 (C. A. 2 1949), rev'd in part *sub nom. Berner* v. *Equitable Office Building Corp.*, 175 F. 2d 218 (C. A. 2 1949).

The fact that in some (but not all[13]) of these cases the parties agreed to the remands because of the changed conditions, while in this case the Commission opposes a remand, does not remove the direct conflict between these decisions and that of the Court below. It only renders more extraordinary the position of the Commission that this case should be decided on the basis of a stale record not reflecting material changes of fact which have occurred since the record before the Commission was closed.

This is not such a case as *R.F.C.* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495 (1946), where this Court reviewed alleged changes in conditions, decided that, if true, they were not sufficiently material to affect the fairness of a reorganization plan, and therefore affirmed the order of the court below. This Court stated that such an order should not be disturbed in the light of changes which "were envisaged and considered by the Commission in its deliberations upon or explanations of the plan" (328 U. S. at p. 522).

In the first place, although the Commission "has adverted to" the new event, *i. e.*, The United Corporation's ceasing to be a holding company, it never did so in connection with the problem of a complexity in the United Cor-

[13] Remand was opposed in the *Standard Gas & Electric Co.* case and in *Knight* v. *Wertheim & Co.*

poration holding company system (R. 10, 30). The Commission's consideration of it is remarkably similar to the consideration of facts by the I. C. C. which was held insufficient by this Court in *Yonkers* v. *U. S.*, 320 U. S. 685, 687-8 (1944), quoted at pages 12 and 13 hereof above. Secondly, in the *Denver & Rio Grande Western R. Co.* case and other similar cases courts have refused to remand cases in the light of new events only where they found that there was still ample evidence in the record, as a whole (*including evidence of the new event*) to support the decision below *as of the date of the court decision.*[14] That is impossible in this case today and was on March 31, 1953. In most of the cases cited above (the point is not clear in all of them), the new events which occasioned the remands had not been "considered or envisaged" by the commission or court below. But for these reasons that fact does not distinguish them from the case at bar.

The decision of the Court below on this question also conflicts, at least in principle, with decisions of courts of appeals in four circuits, one of which was affirmed by this Court, in cases arising under Section 10(e) of the National Labor Relations Act (49 Stat. 454-5, 29 U. S. C. § 160(e)). That section, in language almost identical with Section 24(a) of the Holding Company Act, provides that if a party applies to the court for leave to adduce additional evidence which is material, and there were reasonable grounds for failure to adduce it before the board, the court may order such evidence to be taken before the board. Each of these courts of appeals has ordered evidence of a change in relevant facts or an amendment of the applicable statute, or newly discovered evidence of

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[14] In discussing this case in the companion case of *Insurance Group Committee* v. *Denver & Rio Grande Western R. Co.*, 329 U. S. 607 (1947), this Court said, at page 614: "Our holding was not based upon a conclusion that this court could not take judicial notice of changes in economic conditions subsequent to approval by the Interstate Commerce Commission. We concluded that, even if weighed, the alleged changes were not of a kind which justified re-examination of the plan. 328 U. S. 495, 534."

preexisting facts, to be taken before the board, or has considered the new evidence and in the light thereof reversed the board. *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F. 2d 441 (C. A. 9 1950) (change of fact); *N.L.R.B.* v. *Brown & Sharpe Mfg. Co.*, 169 F. 2d 331 (C. A. 1 1948) (amendment of law); *Berkshire Employees Assn.* v *N.L.R.B.*, 121 F. 2d 235 (C. A. 3 1941) (newly discovered evidence); *N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 124 F. 2d 50 (C. A. 6 1941), aff'd 318 U. S. 9 (1943) (newly discovered evidence).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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